APPENDIX

TABLE OF CONTENTS

Appendix A:	Summary Order, United States Court of Appeals for the Second Circuit (August 3, 2010)	1a
Appendix B:	Opinion, United States District Court for the Southern District of New York (August 18, 2009)	14a
Appendix C:	Statute 28 U.S.C. § 1610(a) & (d)	33a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Filed August 3, 2010]

09-3908-cv, 09-3928-cv

EM Ltd.,

Plaintiff-Appellee,

v.

The Republic of Argentina,

Defendant-Appellant,

Banco de la Nación Argentina,

Interested-Non-Party-Appellant.

09-3910-cv, 09-3934-cv

NML Capital, Ltd.,

Plaintiff-Appellee,

v.

The Republic of Argentina,

Defendant-Appellant,

Banco de la Nacion Argentina,

Interested-Non-Party-Appellant.

09-3926-cv, 09-3937-cv

NML Capital, Ltd.,

Plaintiff-Appellee,

v.

The Republic of Argentina,

Defendant-Appellant,

Banco de la Nación Argentina,

Interested-Non-Party-Appellant.

09-3927-cv, 09-3931-cv

NML Capital, Ltd.,

Plaintiff-Appellee,

v.

The Republic of Argentina,	)
	)
Defendant-Appellant,	)
	)
Banco de la Nación Argentina,	)
	)
Interested-Non-Party-Appellant.	)
	)

09-3929-cv, 09-3932-cv

NML Capital, Ltd.,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
The Republic of Argentina,	)
	)
Defendant-Appellant,	)
	)
Banco de la Nación Argentina,	)
	)
Interested-Non-Party-Appellant.	)
	)

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED

WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of August, two thousand ten.

PRESENT:

BARRINGTON D. PARKER,
DEBRA ANN LIVINGSTON,
DENNY CHIN,
Circuit Judges.

FOR APPELLANT:

CARMINE D. BOCCUZZI (JONATHAN I. BLACKMAN, CHRISTOPHER P. MOORE, *on the brief*), Cleary Gottlieb Steen & Hamilton LLP, New York, NY

FOR INTERESTED-NON-PARTY-APPELLANT:

MARK S. SULLIVAN (LAURA M. LESTRADE, *on the brief*), Dorsey & Whitney LLP, New York, NY

FOR APPELLEE EM LTD.:

DAVID W. RIVKIN, JOHN B. MISSING, SUZANNE M. GROSSO, *on the brief*, Debevoise & Plimpton LLP, New York, NY

FOR APPELLEE
NML CAPITAL, LTD.:
DENNIS H. HRANITZKY (ROBERT A. COHEN , DAVID M. BIGGE, *on the brief*), Dechert LLP, New York, NY

UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be **AFFIRMED**.

Defendant-Appellant the Republic of Argentina ("Republic") and Interested-Non-Party-Appellant Banco de la Nación Argentina ("BNA") (together, "Appellants") appeal from an August 18, 2009 opinion and order of the United States District Court for the Southern District of New York (Griesa, *J.*) granting the motions of Plaintiffs-Appellees EM Ltd. and NML Capital, Ltd. ("Appellees") to confirm *ex parte* orders dated May 22, 2007 restraining and attaching certain assets of the Republic in a trust (the "BH Trust") administered by the U.S. Bank Trust National Association ("U.S. Bank Trust") and denying BNA's motion to vacate these orders. We assume the parties' familiarity with the underlying facts, procedural history, and the issues on appeal. For the reasons that follow, we reject the Appellants' arguments and affirm the opinion and order of the district court.

1. Availability of Assets for Attachment and Restraint

As the district court explained—and as the parties do not challenge—a federal court employs the attachment and execution procedures provided by the law of the state in which the court sits. Fed. R. Civ. P. 69(a); *see Alliance Bond Fund, Inc. v. Grupo Mexicano*

De Desarrollo, S.A., 190 F.3d 16, 20 (2d Cir. 1999) (applying Federal Rule of Civil Procedure 69(a) and, hence, New York law, in an Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-11, action). In this case, therefore, the district court properly employed the procedures provided under New York law.

Some of the orders confirmed by the district court were pre-judgment attachments and some were post-judgment restraints; the requirements under New York law are similar for both. *See* N.Y. C.P.L.R. §§ 5201(b), 6202. At issue here is the requirement that, if the attachment or restraint is served on a person other than the defendant, that entity must, at the time of attachment be "in the possession or custody of property in which [such person] knows or has reason to believe" the defendant or judgment debtor has an interest. N.Y. C.P.L.R. §§ 5222(b), 6214(b). We review the district court's ruling on a request for order of attachment for abuse of discretion. *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 129 (2d Cir. 2009). "The district court abuses its discretion if it applies legal standards incorrectly, relies on clearly erroneous findings of fact, or proceeds on the basis of an erroneous view of the applicable law." *Id.* We review *de novo* the district court's determination of Argentine law, *Norwind v. Rowland*, 584 F.3d 420, 429 (2d Cir. 2009), and choice of law decision, *Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir. 1998).

The district court determined that, after "weigh[ing] plaintiffs' offer of proof against the contrary evidence offered by BNA," *see Capital Ventures Int'l v. Republic of Argentina*, 443 F.3d 214,

222 (2d Cir. 2006) (explaining that a "court presented with an application for an order of attachment must determine whether a statutory ground for attachment exists" by "weighing . . . [the] evidence"), the Public Funds, which have the right to receive distributions from the BH Trust, are "part of the Republic" and their rights to receive distributions from the BH Trust were therefore properly attached. The court also concluded that the corpus of the BH Trust was properly attached. Appellants have not pointed to anything in the record that leads us to conclude that the district court abused its discretion when it found that the evidence weighed in favor of Appellees here. For the reasons articulated by the district court, therefore, we agree that the record shows that the Republic, on numerous occasions, took action consistent with discretionary use of the Public Funds as part of the Republic itself and that the Funds were properly attached and restrained to satisfy the debts of the Republic.

We further affirm the district court's decision to confirm the orders attaching or restraining the assets in the BH Trust. Appellants' primary argument that attachment and restraint of these assets was in error is that the BH Trust is a valid trust under Argentine law and the assets in the trust belong to the trust itself, not to the Republic. "[T]he FSIA implicitly requires courts to apply the choice of law provisions of the forum state with respect to all issues governed by state substantive law." *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 959 (2d Cir. 1991); *see also Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 85 (2d Cir. 2002) ("[I]n FSIA cases, we use the forum state's choice of law rules to resolve *all* issues, except jurisdictional ones."

(internal quotation marks omitted)). Under New York law, "[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *Id.* If a conflict is identified, New York requires application of an "interests analysis" in which "the law of the jurisdiction having the greatest interest in the litigation [is] applied and . . . the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict." *Id.* Finally, "New York law requires the court to honor the parties' choice [of law provision] insofar as matters of substance are concerned, so long as fundamental policies of New York law are not thereby violated." *Woodling v. Garrett Corp.*, 813 F.2d 543, 551 (2d Cir. 1987).

We therefore look to New York law to determine whether the BH Trust is a valid trust. Here, the record supports the conclusion that, despite the choice of law provision in the BH Trust agreement purporting to establish a trust pursuant to Argentine law, New York law would not recognize it as such since enforcing the trust agreement would violate "fundamental policies" of New York law. Both parties agree that, under Argentine law, the BH Trust is a valid trust that would be protected from the Republic's creditors. However, in New York, "[i]t is against public policy to permit the settlor-beneficiary to tie up her own property in such a way that she can still enjoy it but can prevent her creditors from reaching it." *Vanderbilt Credit Corp. v. Chase Manhattan Bank, NA*, 100 A.D.2d 544, 546, 473 N.Y.S.2d 242, 246 (2d Dep't 1984). For instance, "a judgment creditor may reach the corpus of the trust if the trust agreement grants the trustee the power to invade the corpus and pay the

entire principal to the settlor." *In re Portnoy*, 201 B.R. 685, 698 (S.D.N.Y. 1996).

According to the trust agreement, the corpus of the BH Trust is to be sold and distributed by order of the BH Trust trustee. However, it is the Assistance Fund—through its Executive Committee, members of which are appointed by the federal government—that directs the trustee of the BH Trust when to sell American Depository Shares ("ADSs") so that the proceeds can be distributed to the Assistance Fund and then used to capitalize the Infrastructure Fund. As the district court determined, the Assistance Fund is actually part of the Republic. In effect, then, the assets that comprise the corpus of the BH Trust are controlled directly by the Republic. Because the Republic has the current authority to direct disposition of the corpus of the BH Trust for its own benefit, we believe that, for reasons of long-standing public policy, New York law would not recognize the BH Trust as a valid trust entitled to protection against creditors. Thus, it was not error for the district court to confirm the orders attaching and restraining the corpus of the BH Trust.

Appellants additionally argue, with regard to the Public Funds, that the district court erred in performing a choice of law analysis and determining that neither Argentine or New York law would consider them to be valid trusts. We need not opine on the choice of law question with regard to the Public Trusts because even under Appellants' suggested analysis pursuant to Argentine law, for the reasons articulated in the district court's opinion, which we have reviewed *de novo*, we agree with the district court

that the Public Funds are not valid trusts protected from attachment and restraint.

Finally, we agree with the district court that the Public Funds are not protected by *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983), in which the Supreme Court held that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *Id.* at 627. Whether an entity is an instrumentality or an agency of the foreign state is determined by considering "whether the core functions" of the entity "are predominately governmental or commercial." *Garb v. Republic of Poland*, 440 F.3d 579, 594 (2d Cir. 2006) (internal quotation marks omited). If the entity at issue is an instrumentality of the foreign state, its property cannot be used to satisfy the judgments of that state. *See De Letelier v. Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984). The *Bancec* presumption can be overcome if, under the principles of corporate law, the separate juridical status of the instrumentality should be disregarded. *Id.* at 794; *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 477 (2d Cir. 2007).

Here, we need not decide whether the Funds are or are not entitled to the *Bancec* presumption as instrumentalities of the Republic since, even if they are, we would determine that the Funds are "so extensively controlled by [their] owner that a relationship of principal and agent is created" such that the presumption would be overcome. *See Bancec*, 462 U.S. at 629. The Assistance Fund is controlled by state appointees who make decisions about when to access the assets in the BH Trust in order to effectuate the goals of the Infrastructure Fund. And as previously

discussed, the Republic has repeatedly treated the Funds as its own. This is sufficient for us to conclude that, even if the Funds are properly considered instrumentalities, any presumption of a separate juridical status has been overcome.

2. Foreign Sovereign Immunities Act

Pursuant to the FSIA, "property in the United States of a foreign state shall be immune from attachment arrest and execution," except as otherwise provided by exceptions set forth in 28 U.S.C. §§ 1610 and 1611. 28 U.S.C. § 1609. At issue here are sections 1610(a) and (d), which authorize pre- or post-judgment attachment of "property in the United States of a foreign state . . . used for a commercial activity in the United States." *Id.* § 1610(a), (d). "[T]he property that is subject to attachment and execution must be 'property in the United States of a foreign state' and must have been 'used for a commercial activity' at the time the writ of attachment or execution is issued." *Aurelius Capital Partners, LP*, 584 F.3d at 130 (quoting 28 U.S.C. § 1610) (italics omitted). The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* The Supreme Court explained that a foreign state engages in commercial activity "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992); *see also De Letelier*, 748 F.2d at 797 (explaining the inquiry focuses on

"whether the activity is of the type an individual would customarily carry on for profit").

Appellants contend that, contrary to the determination of the district court, the Public Funds' beneficial interests in the BH Trust are not located in the United States and, in any event, none of the attached or restrained property was being used for a commercial activity at the time of attachment. We disagree. As the district court—and Appellants—recognize, the situs of intangible property, such as beneficial interests, is "the location of the party of whom performance is required by the terms of the contract." *ABKCO Indus., Inc. v. Apple Films, Inc.*, 39 N.Y.2d 670, 675, 385 N.Y.S.2d 511, 513 (1976). There is ample evidence in the record to support the district court's determination that the property is located in New York, not Argentina. The BH Trust trust agreement specifies that the trustee of the BH Trust "shall dispose of any Option ADSs or Option Shares . . . remaining in the Trust Property pursuant to the instructions received by the Trustee from" the trustee of the Assistance Fund. Thus, in order to effectuate capitalization of the Public Funds, by the terms of the trust agreement, U.S Bank Trust is required to perform as ordered by the Assistance Fund. The record supports the conclusion that U.S. Bank Trust—the party of whom performance is required—is located in New York. The Garnishee's Statement shows that the BH Trust is held in New York State by U.S. Bank Trust and the United States address of the BH Trust is on Wall Street, which the trust agreement designates as the address of the "principal corporate trust office." Thus, the Public Funds' beneficial interests in the BH Trust are located in New York and

are thus "property in the United States" that were properly attached or restrained by the district court.

We further conclude that, at the time of attachment, the corpus of the BH Trust and the beneficial interests which the Public Funds hold in the BH Trust were being used for a commercial activity. At the time of attachment, the options on the ADSs in the BH Trust had expired and the ADSs themselves were the principal asset forming the corpus of the BH Trust. The purpose of the Public Funds, at the time of attachment, was to facilitate the sale of these ADSs at a time favorable to the Republic. The corpus of the BH Trust was therefore an investment of the Republic and the Public Funds' assets were, as the district court determined, being used to facilitate the investment and eventual sale of the securities. An investment of this sort is the kind of activity that a private player in the market would carry on for profit and is, therefore, a "commercial activity" under the FSIA.

We have considered the remainder of the Appellants' arguments and find them to be without merit.

For the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

03 Civ. 2507 (TPG)

[Filed August 18, 2009]

EM LTD.,	)
	)
Plaintiff,	)
	)
-against -	)
	)
THE REPUBLIC OF ARGENTINA,	)
	)
Defendant.	)
	)

03 Civ. 8845 (TPG)
05 Civ. 2434 (TPG)
06 Civ. 6466 (TPG)
07 Civ. 1910 (TPG)

NML CAPITAL, LTD.,	)
	)
Plaintiff,	)
	)
-against -	)

THE REPUBLIC OF ARGENTINA,)
)
Defendant.)
)

OPINION

Plaintiffs in these actions own defaulted bonds issued by defendant, the Republic of Argentina. Plaintiffs move to confirm certain orders issued by the court on May 22, 2007 restraining and attaching certain assets of the Republic in a trust administered by the U.S. Bank Trust National Association. Banco de la Nación Argentina ("BNA"), as trustee of those assets, opposes the motion and moves to vacate the orders. Plaintiffs' motion to confirm is granted, and BNA's motion to vacate is denied.

Background

Procedural History

On May 22, 2007, on plaintiffs' ex parte motion, the court issued three orders authorizing plaintiffs' attorneys to levy upon certain assets said to belong to the Republic. The orders all directed plaintiffs to "refrain from taking [the assets] into actual custody pending further order of this Court." As described below, the form of the orders differed slightly based on the posture of the cases to which they related. However, all of the orders affected two groups of assets: any beneficial interest of the Republic in the "BH Options Trust" (the "BH Trust"), and assets held by the BH Trust. The orders specifically referred to interests held by the trust in BNA's name, which was done because of BNA's function as trustee of the Fondo

Fiduciario Federal de Infraestructura Regional ("Infrastructure Fund" or "FIR Fund") and the Fideicomiso de Asistencia al Fondo Fiduciario Federal de Infraestructura Regional ("Assistance Fund"). As disclosed in a Garnishee Statement filed in response to the orders, these assets are held by the U.S. Bank Trust National Association.

At the time of the orders, EM Ltd., the plaintiff in case 03 Civ. 2507, and NML Capital, Ltd., the plaintiff in case 03 Civ. 8845, had already obtained judgments against the Republic. Therefore, the court issued Restraining Orders in those cases. In cases 05 Civ. 2434, 06 Civ. 6466, and 07 Civ. 1910, however, plaintiff NML had not yet obtained judgments. In those cases, the court therefore issued an Order of Attachment and Temporary Restraining Order. NML subsequently received judgments in cases 05 Civ. 2434 and 06 Civ. 6466 on May 28, 2009; those judgments were amended on June 12, 2009.

Plaintiffs moved to confirm the orders. The Republic did not submit any argument with respect to these orders. However, since BNA is the trustee of the Infrastructure Fund and Assistance Fund, and therefore the garnishee under the attachment and restraining orders, it opposed plaintiffs' motion and cross-moved to vacate the orders. BNA is a non-party, and there is no dispute for the purposes of this motion that it is an independent entity and that it is not directly liable for the Republic's default.

Plaintiffs and BNA have both submitted several declarations setting forth facts relevant to this dispute. Although they dispute the nature of the Republic's interest in these assets, they generally agree about

many of the basic facts, including facts about the provenance of the assets. Therefore, except where otherwise indicated, the facts set forth below are undisputed.

The BH Trust

The BH Trust was established in 1999 as part of a transaction to sell securities in Banco Hipotecario Nacional, which, at the time, was an Argentine state-owned bank. The privatization of Banco Hipotecario involved offerings of shares, American Depository Shares ("ADSs"), and options to buy shares or ADSs in the bank. The shares offered to the general public were called "Class D" shares.

In support of the privatization effort, the BH Trust held ADSs that corresponded to the Class D shares. These ADSs were to be used to satisfy redemptions of options held by investors in the bank. After those options expired on February 2, 2004, the trust continued to hold 9,090,500 ADSs that corresponded to unexercised options. These securities are now the principal asset of the BH Trust.

The BH Trust is governed by a trust agreement, which provides that, upon order of the trustee, the trust's proceeds are distributed to the Assistance Fund. Any residual funds left over after such distributions are given to the Infrastructure Fund. BNA is designated as the trustee of the BH Trust, and therefore has the exclusive power to order these distributions to occur. Because the Banco Hipotecario options corresponding to the ADSs have expired, there are no entities other than the Assistance Fund,

Infrastructure Fund and, according to plaintiffs, the Republic, that are beneficiaries of the BH Trust.

The Infrastructure and Assistance Funds

The Infrastructure and Assistance Funds were also set up in connection with the privatization of Banco Hipotecario. Both are referred to as "fiduciary funds" or "public trusts."

The Infrastructure Fund was established by Law No. 24,855. That law created the fund to finance "economic and social infrastructure projects" of Argentina's national and provincial governments. The law specified that the fund would "operate within the environment of the Chief of Cabinet Ministers" and would be administered by a board of seven individuals appointed by the federal Executive Branch. The law also requires BNA to serve as the trustee of the fund and administer it "in accordance with instructions received from the administrative board." Subsequently, presidential decree No. 924/97, which implements this law, specified that a private association, the Argentine Construction Chamber, would be asked to nominate individuals to serve on the board. In decree No. 924/97, the national and provincial governments are described as the beneficiaries of the trust, with the national government also described as the residual beneficiary.

The Assistance Fund was established by presidential decree No. 924/97. The "sole purpose" of the Assistance Fund is "to proceed with capitalizing the [Infrastructure Fund] through the contribution of the net proceeds from the sale of the shares of" Banco Hipotecario. The Assistance Fund is required to "act

according to the instructions" of its Executive Committee, the members of which are appointed by officials of the federal government. BNA is appointed as the "Fiduciary Agent" of the Assistance Fund. The Assistance Fund principally owns "Class A" shares in Banco Hipotecario, which, by law, can only be owned by the Republic itself.

Thus, in short, proceeds from the Banco Hipotecario sale—which include the ADSs now being held in the BH Trust—accrue to the Assistance Fund, which then funds the Infrastructure Fund, which then makes loans to the federal and provincial governments to support infrastructure development.

The CPLR and the Republic's Interest in the Attached Property

Under the Federal Rules of Civil Procedure, a federal court employs the attachment and execution procedures provided by the law of the state in which the court sits. See Fed. R. Civ. P. 64 (referring to state law for pre-judgment attachment procedures); Fed. R. Civ. P. 69 (referring to state law for post-judgment execution procedures). The New York Civil Practice Law and Rules ("CPLR") therefore govern the attachment and restraint of assets under these orders.

The CPLR impose similar requirements for both pre-judgment attachments and post-judgment restraints. First, attachments and restraints must be issued against "property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested." CPLR §§ 5201(b); 6202. Second, if the attachment or restraint is served on a person other than the

defendant, that person must, at the time of service, owe a debt to the defendant or be "in the possession or custody of property in which such person knows or has reason to believe" that the defendant has an interest. §§ 5222, 6214(b).

For a pre-judgment attachment to be confirmed, a plaintiff must satisfy three additional requirements. First, one of five statutory grounds for attachment must exist. CPLR § 6201. One of these grounds is that the defendant is not a domiciliary of New York, § 6201(1), and another is that "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment," has assigned or concealed property, or removed it from New York, "or is about to do any of these acts." § 6201(3). Second, the plaintiff must establish that it has a cause of action, that it is likely to succeed on the merits, and that the amount demanded from the defendant exceeds the defendant's known counterclaims against the plaintiff. CPLR § 6212. Third, the plaintiff must establish a need for continuing the attachment. CPLR § 6213.

Plaintiffs have indisputably satisfied most of these requirements. First, the Republic is a nondomiciliary residing outside New York. Second, the plaintiffs have a cause of action and are likely to succeed on the merits, given the Republic's undisputed liability in these actions. Third, since the Republic has not asserted counterclaims against the plaintiffs, the amounts sought by plaintiffs exceed the value of the Republic's counterclaims. Fourth, there is a need to continue the attachments, since the funds could be immediately transferred outside the United States if the court's orders were vacated.

The remaining requirements are more complex. Plaintiffs seek to restrain and attach the corpus of the BH Trust, as well as the Republic's "rights to receive distributions" from the BH Trust "as Certificateholder through the Assistance Fund, and as Residual Beneficiary through the [Infrastructure] Fund." Thus, for the orders to be confirmed, the court must find that (1) the Republic has an interest in the corpus of the BH Trust, as well as a right to distributions from the BH Trust, (2) the Republic's right to distributions gives it an interest in the trust assets, and (3) these interests are "property which could be assigned or transferred."

There is no question that the Assistance Fund has a right to distributions from the BH Trust, and that the Infrastructure Fund has a right to receive any residual distributions upon the termination of the BH Trust. However, the critical question is whether the Republic's rights to the BH Trust assets are equivalent to the Funds' rights. In essence, plaintiffs argue that because the Republic has repeatedly treated the Assistance and Infrastructure Funds as a discretionary source of revenue, it has shown that the Republic has the same rights to distributions as the Assistance and Infrastructure Funds do.

There is an initial question as to plaintiffs' burden of proof on these motions. Plaintiffs argue that they need only make out a prima facie case and that the facts they allege must be assumed to be true. Although this is true when a court is considering whether a plaintiff has shown that it is likely to succeed on the merits of the case, that is not a disputed question on this motion. See, e.g., Bank of Leumi Trust Co. of N.Y. v. Istim, Inc., 892 F. Supp. 478, 482 (S.D.N.Y. 1995).

Plaintiffs have cited no case, and the court has found none, that applies such a liberal standard with respect to the other elements that plaintiffs must satisfy. To the contrary, the Second Circuit has indicated that in determining whether a plaintiff has satisfied the statutory grounds for attachment, it must engage in the "weighing of evidence and also in balancing competing considerations." Capital Ventures Int'l v. Republic of Arg., 443 F.3d 214, 222 (2d Cir. 2006). It is therefore more appropriate to weigh plaintiffs' offer of proof against the contrary evidence offered by BNA, rather than simply assuming that plaintiffs' allegations are true.

Even under that standard, however, the evidence establishes that the Assistance and Infrastructure Funds are part of the Republic. First, plaintiffs have demonstrated that the Republic has treated the assets of the Assistance and Infrastructure Funds as assets of the Republic itself. In 2004, the Republic issued a presidential decree, Decree No. 906/2004, which required the Infrastructure and Assistance Funds (along with several other fiduciary funds) to invest their assets in Argentine treasury bills and in financial instruments issued for the purpose of financing infrastructure projects. The decree referred to these funds as "the national government's trust funds," and characterized the measure as part of a strategy to "reactivate the economy" and satisfy "the public treasury's temporary needs for liquid assets" without resorting to "an increase in public debt." In 2001, Decree No. 957/01 lowered the salaries of the administrators of fiduciary funds, including the Infrastructure Fund, and required the savings to be contributed to the national treasury. In 2002, Law No. 25,565 required fiduciary funds, including the

Infrastructure Fund, to together contribute 200 million pesos "for the payment of debt." BNA contends that the Infrastructure Fund was ultimately not required to make the payments to the treasury that Decree 957/01 and Law 25,565 mandated. Nonetheless, it is still the case that on at least three occasions, the Argentine government issued requirements that, in essence, treated the assets of the Assistance and Infrastructure Funds as assets of the Republic itself.

Second, the principal asset of the Assistance Fund is Class A shares in Banco Hipotecario. Law No. 24,855, which set up the Infrastructure Fund and instituted the privatization of Banco Hipotecario, defined Class A shares as shares "owned by the Federal Government." Although Class A shares can be sold to private entities, they are immediately converted to Class C or D shares when that happens. Moreover, as long as the Class A shares remain the principal asset of the Assistance Fund, "all the political rights emerging from them will belong to the State." BNA contends that the Assistance Fund merely holds the Class A shares as an agent of the Republic. Even assuming that to be true, however, the Republic is still the owner of the shares, and therefore of the Assistance Fund's assets.

The Republic's own actions therefore establish that the Assistance and Infrastructure Funds are essentially used as discretionary funds of the Republic, and that the Republic has a right to use the assets of the Funds as it wishes. The Funds are therefore part of the Republic, and, by extension, the Republic has the same legal rights as the Funds themselves. Since it is undisputed that the Assistance and Infrastructure Funds have a right to distributions from the BH Trust,

and ultimately to the corpus of the Trust, the Republic has these rights as well. Since the trust agreement explicitly provides for assignments and transfers of the interests of the Funds in the BH Trust, the Funds' interests in the BH Trust constitute "property which could be assigned or transferred," as required by the CPLR.

Protection Under Trust Law

BNA argues that, under Argentine law, the Assistance and Infrastructure Funds should be viewed as "trusts," and their assets should therefore be considered immune from the Republic's creditors. Plaintiffs contend that Argentine law does not extend such protection to the Assistance and Infrastructure Funds. They further contend that if Argentine law did provide such protections, the court could not enforce that immunity as a matter of New York law.

This dispute presents the preliminary question of whether to look to New York or Argentine law. New York's choice-of-law rules, which govern in this context, require the court to first determine whether there is an actual conflict between the laws of New York and Argentina. Karaha Bodas, LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 85 (2d Cir. 2002). If a conflict does exist, the law of the jurisdiction having the greatest interest in the litigation is applied. Id. These interests are determined by identifying the purposes of the conflicting laws and evaluating the facts of the case that relate to those purposes. Id. at 87.

In this case, there is no conflict, since neither Argentine nor New York law would treat the Assistance and Infrastructure Funds as valid trusts.

Argentine Law

Argentine trust law is set forth primarily in Law No. 24,441. That law states that a trust exists when a settlor "transfers fiduciary ownership of certain assets to another (trustee), who undertakes to exercise that ownership in benefit of whoever is designated in the trust agreement (beneficiary)." The law also provides that the trustee has the power to "dispose of or encumber the assets in trust when so required by the purposes of the trust, without the consent of the settlor or the beneficiary being necessary, unless otherwise agreed." Furthermore, a trustee is legally entitled to receive a management fee and to resign. Assets in trust are considered "separate from the assets of the trustee and the settlor." Trust assets are then exempt from legal action by the creditors of either the trustee or, except in a case of fraud, the settlor. However, a "beneficiary's creditors may exercise their rights to the fruits of the assets in trust and subrogate the beneficiary's rights."

Law No. 24,855, however, which established the Infrastructure Fund, explicitly preempts Law No. 24,441, to the extent that they conflict. This is consistent with the fact that the fiduciary funds are considered to be distinct from the typical "private" trust envisioned by Law 24,441. The fiduciary funds are all created by legislation with the purpose of using their funds for public purposes, and they do not bear all of the hallmarks of a conventional private trust.

An initial matter of nomenclature must be resolved. If the Funds were considered to be trusts, the Republic would be both their settlor and the beneficiary. The parties appear to agree that the Republic is properly considered the settlor of the Infrastructure Fund, since, by privatizing Banco Hipotecario, it provided the assets to the funds.

The Republic is also the beneficiary of both Funds, despite BNA's argument that the Infrastructure Fund has no beneficiary and that the beneficiary of the Assistance Fund is the Infrastructure Fund. BNA's position is inconsistent with Decree Nos. 924/97 and 228/98, both of which refer to the Republic as a beneficiary of the Infrastructure Fund. Moreover, Law 24,441 defines a beneficiary as the entity for whose benefit a trust is operated, which is clearly the Republic in this case. In addition, if it were true that the Infrastructure Fund has no beneficiary, it could not be considered a trust within the scope of Law 24,441. Since both Funds operate for the benefit of the Republic—whether as a source for infrastructure financing or more general financial needs—the Republic is clearly the beneficiary of the Funds.

For two primary reasons, the Funds do not qualify as "trusts" for purposes of Law 24,441, and therefore cannot invoke the protections afforded to trusts by Argentine law.

First, BNA is forbidden from managing the trust assets without the Republic's consent. It is, in fact, specifically required to follow the instructions of officials appointed by the Republic. Indeed, by BNA's own account, BNA has little involvement in managing the trust funds, and instead leaves those

responsibilities to the officials appointed by the government. This is contrary to the requirement of Law 24,441 that trustees have the power to manage assets "without the consent of the settler or the beneficiary." Similarly, the prohibition on BNA resigning as trustee or accepting a management fee is contrary to the typical powers of a trustee under Law 24,441.

BNA's arguments on this issue are unconvincing. BNA argues that Law 24,441 allows trustees' decisions to be subject to the consent of a settlor or beneficiary, as long as that is set forth in the trust agreement. However, plaintiffs have offered persuasive evidence from experts in Argentine law that this provision is typically understood to allow a settlor to consult with the trustee on the use of trust assets, not to control the trustee's decisionmaking by requiring the trustee to adhere to instructions of the settler's appointees.

Furthermore, as discussed above, the assets of the Assistance and Infrastructure Funds are not treated as distinct from the assets of the settlor, the Republic. To the contrary, the Republic has repeatedly decreed that the assets of the Assistance and Infrastructure Funds are a legitimate source of funds for the Republic itself. It may be true, as BNA contends, that the Funds are nominally "extra-budgetary" entities, and therefore do not receive any appropriations from the national treasury. Nonetheless, that fact has not prevented the Republic from determining that it had the power to use the Funds' assets without seeking permission of the "trustee."

These conclusions are bolstered by an opinion of Argentina's Attorney General, which determined that

because of the "restrictions posed by" Law 24,855 on BNA, "the term 'trustee' is used [with respect to the Funds] in the sense of [an] agent." Similar conclusions have been reached by other Argentine legal experts, including a law professor who has submitted detailed affidavits on behalf of plaintiffs. These opinions are well supported by the facts discussed above, and are significantly more persuasive than the opinions of BNA's experts.

Argentine trust law would therefore not shield the assets of the Assistance and Infrastructure Funds from the Republic's creditors.

New York Law

Plaintiffs argue that New York trust law would not recognize the Funds as trusts. BNA does not address this argument, and may therefore be deemed to have conceded it. Irrespective, plaintiffs are correct on the merits.

CPLR section 5205(c) exempts from attachment and restraint the principal of a trust "created by . . . a person other than the judgment debtor." However, since the Republic, the judgment debtor, created the Funds, section 5205(c) facially does not apply.

Furthermore, New York trust law provides that a trust "for the use of the creator is void as against the existing or subsequent creditors of the creator." N.Y. Est. Powers & Trusts Law § 7-3.1(a). Thus, "when a person creates for his own benefit a discretionary trust, his creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him" because it "is against public policy to

permit the settlor-beneficiary to tie up her own property in such a way that she can still enjoy it but can prevent her creditors from reaching it." Vanderbilt Credit Corp. v. Chase Manhattan Bank, NA, 100 A.D.2d 544, 546 (2d Dep't 1984). Since, as discussed above, the Republic created the Funds for its own benefit (and has subsequently used the assets of the Funds for its own benefit), New York law does not protect the assets of the Funds from the creditors of the Republic.

Finally, it is commonly accepted that "creditors of a trust beneficiary . . . can subject the interest of the beneficiary to the satisfaction of their claims." Restatement (Third) of Trusts § 56; see also N.Y. Est. Powers & Trusts Law § 7-3.4.

Like Argentine law, New York law would therefore permit the attachment of these funds.

The Bancec Presumption and the FSIA

BNA's remaining arguments are unpersuasive.

First, the assets of the Funds are not protected by the doctrine of First National City Bank v. Banco Para el Comercio Exterior de Cuba ("Bancec"). In Bancec, the Supreme Court held that "a presumption of independent status" attaches to "instrumentalities established as juridical entities distinct and independent from their sovereign." 462 U.S. 611, 626-27 (1983). However, nothing in the legislation creating the Assistance and Infrastructure Funds indicates that the Funds were established as distinct, independent entities. As discussed above, the conduct of the Republic with respect to the Funds establishes

that the Funds are not viewed by the government as distinct entities. Furthermore, plaintiffs contend that Argentine law requires that an entity can only be considered a separate "juridical entity" under Argentine law if it is explicitly designated one, and BNA has not disputed this. At most, BNA has offered evidence that the Funds have the power to contract and engage in litigation, but the Second Circuit has, in a related context, noted that it would be inappropriate to give dispositive weight to such powers. Garb v. Republic of Pol., 440 F.3d 579, 595.

Second, the assets of the Funds are not immune from attachment and execution under the Foreign Sovereign Immunities Act ("FSIA"). The FSIA provides exceptions to sovereign immunity when (1) the property is "used for a commercial activity in the United States," (2) the sovereign has waived its immunity from attachment and execution, and, in cases where a judgment has not yet issued, (3) "the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction." 28 U.S.C. § 1610(a), (d). These requirements are all satisfied here.

The basic inquiry in determining whether an activity is "commercial" is "whether the activity is of the type an individual would customarily carry on for profit." De Letelier v. Republic of Chile, 748 F.2d 790, 797 (2d Cir. 1984). The FSIA mandates that "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." § 1603(d). Thus, courts must focus on the "actual," immediate use of funds, rather

than on why that use is occurring. EM Ltd. v. Republic of Arg., 473 F.3d 463, 484-85 (2d Cir. 2007). Thus, "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial.'" Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 614 (1992).

By using the Funds' assets to facilitate the sale of securities, the Republic acted as nothing more than a "private player" in the market, and therefore used the property for a commercial activity in the United States. Although BNA contends that the court should consider the ultimate use of the Republic's profits to fund infrastructure projects, the court is not permitted to consider the "purpose" of the Republic's activity in determining whether it was commercial in nature.

With respect to waiver, the second element of the exception to immunity, it has been repeatedly recognized that when the Republic issued the defaulted bonds at issue here, it explicitly waived its sovereign immunity from suits based on the bonds. See EM, 473 F.3d at 468, 480 n.18. Since, as discussed above, the Funds are part of the Republic and are not distinct entities, that waiver extends to the Funds' assets as well. Finally, there is no dispute that the purpose of the attachment in the pre-judgment cases here was to secure satisfaction of the judgment, and not to obtain jurisdiction.

Third, the frozen property is located in New York, and is therefore subject to attachment by the court. BNA contends that the Republic's beneficial interests in the Fund assets can only be located in Argentina. Under New York law, however, the situs of intangible

property, such as beneficial interests, is "the location of the party of whom performance is required by the terms of the contract." ABKCO Indus., Inc. v. Apple Films, Inc., 39 N.Y.2d 670, 675 (1976). Here, for the Republic's interests in the Fund assets to be satisfied, action must be taken by U.S. Bank, where the BH Trust is located. The situs of those interests is, therefore, New York, and is within the court's jurisdiction.

Conclusion

For the reasons stated above, plaintiffs' motion to confirm the May 22, 2007 orders is granted, and BNA's motion to vacate the orders is denied.

SO ORDERED.

Dated: New York, New York
August 19, 2009

/s/ Thomas P. Griesa
Thomas P. Griesa
U.S.D.J.

APPENDIX C

28 U.S.C. § 1610(a) & (d)

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or ....

(2) the property is or was used for the commercial activity upon which the claim is based ...

* * *

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.